IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KEVIN JOSEPH SMITH, Appellant.	No. 37573-7-II & No. 38226-1-II (Consolidated) PART PUBLISHED OPINION
In re the Personal Restraint Petition of KEVIN JOSEPH SMITH, Petitioner.	No. 39362-0-II (Consolidated w/ No. 37573-7-II)

Armstrong, J. — An officer searched Kevin Joseph Smith's wallet and discovered methamphetamine. The State charged Smith with unlawful possession of a controlled substance, and Smith failed to appear for trial. In two separate cases, juries convicted Smith of unlawful possession of a controlled substance and bail jumping. In consolidated appeals, Smith argues (1) he was unlawfully seized at the time the police searched his wallet; (2) the trial court erred by allowing the State to re-file the bail jumping charge as a separate case; and (3) his untimely arraignment on the bail jumping charge violated his right to speedy trial. In a statement of additional grounds, Smith asserts that the trial court violated various rules of criminal procedure regarding setting his second trial, failing to determine probable cause after his mistrial, and allowing judges other than the trial judge to process his case. Finally, Smith contends that the prosecutor impeded his investigation, and his counsel ineffectively represented him.[1] Finding no

[1] Smith has also filed a personal restraint petition (PRP) in which he restates several issues from

reversible error, we affirm.

FACTS

On July 13, 2007, officers from the Department of Corrections and Detective Floyd May visited the Chieftain Motel in Bremerton. After arresting one client with an outstanding warrant, they decided to check on another client, Christina Ohnemus, who had a room in the same motel. Kevin Joseph Smith and Ron De'Bose were in Ohnemus's room, and the officers asked the men to leave while they briefly searched the room. Smith walked outside, but De'Bose chose to remain.

While Smith was standing outside the room, Detective May approached and asked his name. Detective May then stepped back a few feet to check for warrants on his hand-held radio. The officer found no outstanding warrants, but the physical description associated with Smith's name stated his eye color was hazel. The detective observed Smith's eyes were blue. Detective May testified that it is common for people with warrants to give a false name, so he asked if Smith had any identification with him. Smith handed the detective a check cashing card that described Smith's eyes as blue. Due to the continued discrepancy, Detective May asked if Smith had any other identification. While Smith was holding his wallet open, the detective asked if he could look in the wallet and Smith handed it to him.

Detective May looked through Smith's wallet and found several cards with different names. After arresting Smith for identity theft, Detective May searched Smith's wallet and found a small plastic bag containing methamphetamine. The State charged Smith with unlawful

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his direct appeal. We have consolidated the appeals from his two trials and the PRP and discuss all issues in this opinion.

possession of methamphetamine. At trial, Smith moved to suppress the evidence found in his wallet. The trial court denied his motion, and a jury found him guilty.

ANALYSIS

Smith assigns error to the trial court's denial of his motion to suppress the methamphetamine found in his wallet. Smith challenges four of the trial court's findings of fact and two of the court's conclusions of law. When reviewing a motion to suppress, we review challenged findings of fact for substantial supporting evidence and challenged conclusions of law de novo. *See State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003); *State v. Eisfeldt*, 163 Wn.2d 628, 634, 185 P.3d 580 (2008). Substantial evidence is evidence sufficient to persuade a rational person that the finding is true. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Smith does not argue that the challenged findings of fact are unsupported by substantial evidence. Rather, he focuses on the trial court's conclusions of law: (1) there was no improper contact between Detective May and Smith and (2) Smith's consent to search was valid.

Consent is one of the narrow exceptions to the Washington State Constitution's prohibition against warrantless searches. *See* Wash. Const. art. I, § 7; *Eisfeldt*, 163 Wn.2d at 635; *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). For consent to be valid, a person must consent freely and voluntarily. *O'Neill*, 148 Wn.2d at 588. An illegal seizure may invalidate voluntary consent. *See State v. Armenta*, 134 Wn.2d 1, 16-17, 948 P.2d 1280 (1997). A person is "seized" when his freedom of movement is restrained by physical force or a show of authority, and a reasonable person would not feel free to leave or otherwise decline an officer's request and terminate the encounter. *O'Neill*, 148 Wn.2d at 574. The standard is objective.

O'Neill, 148 Wn.2d at 574.

Smith argues he was seized when the officers asked him to leave the motel room. He relies on cases where a driver or passenger was seized upon being asked to exit a vehicle. But the facts here are significantly different from those in the cases Smith cites. Smith's companion chose to remain in the room, strongly suggesting that the officers did not require Smith to leave. Moreover, the officers did not instruct Smith to remain in the area outside the room. Smith has not shown that his freedom of movement was restrained at that point; he was not seized. *See O'Neill*, 148 Wn.2d at 547.

Smith next argues he was seized when Detective May began questioning him in the presence of several officers bearing weapons. At the time of questioning, Detective May's gun was visible, there were two officers in the motel room, and another officer stood approximately six feet away with an AR-15 rifle slung over his back. The "'threatening presence of several officers'" or the "'display of a weapon by an officer'" may convert a casual encounter between a police officer and a citizen into a seizure. *State v. Young*, 135 Wn.2d 498, 512-13, 957 P.2d 681 (1998) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)). But the fact that an officer is armed, without more, does not convert an encounter into a seizure. *State v. Soto-Garcia*, 68 Wn. App. 20, 24, 841 P.2d 1271 (1992), *abrogated in part by State v. Thorn*, 129 Wn.2d 347, 350, 917 P.2d 108 (1996). Smith does not argue that the officers' conduct was threatening. He simply argues that their presence was threatening because some were visibly armed. These circumstances, without more, did not convert the casual encounter between Detective May and Smith into a seizure.

Smith next argues he was seized when Detective May retained his identification card. An officer's request for identification, without more, is not a seizure. *State v. Ellwood*, 52 Wn. App. 70, 73, 757 P.2d 547 (1988). If an officer removes a suspect's identification or property from the suspect's presence, then the suspect is seized. *See State v. Hansen*, 99 Wn. App. 575, 578-79, 994 P.2d 855 (2000). Once Detective May requested identification, he remained within two to three feet of Smith while holding Smith's check cashing card. Smith was not seized because Detective May did not remove Smith's identification or property from his presence. *See Hansen*, 99 Wn. App. at 579.

Finally, Smith argues this case is similar to *State v. Soto-Garcia*, 68 Wn. App. 20, 841 P.2d 1271 (1992). In that case, an officer asked Soto-Garcia if he had cocaine. Soto-Garcia said no, but consented to a search. The officer discovered cocaine in his shirt pocket. *Soto-Garcia*, 68 Wn. App. at 22. We held that Soto-Garcia was seized when the officer requested permission to search, reasoning that the "atmosphere created by [the officer's] progressive intrusion into Soto-Garcia's privacy was of such a nature that a reasonable person would not believe that he or she was free to end the encounter." *Soto-Garcia*, 68 Wn. App. at 25. In *State v. Harrington*, No. 81719-7, 2009 WL 4681239 (Wash. Dec. 10, 2009), the Washington State Supreme Court recently discussed *Soto-Garcia* and also held that an officer's "progressive intrusion" into a defendant's privacy resulted in a seizure.

The *Harrington* court summarized *Soto-Garcia*, describing the independent elements that amounted to a seizure as: "[the officer's] inquiry about Soto-Garcia's identification, warrant check, direct question about drug possession, and request to search [Soto-Garcia]—all of which,

combined, formed a seizure." *Harrington*, No. 81719-7, 2009 WL 4681239, at *6. The *Harrington* court compared *Soto-Garcia* to Harrington's case, and held that Harrington was also seized by an officer's progressive intrusion into his privacy:

> [Officer] Reiber initiated contact with Harrington on a dark street. He asked questions about Harrington's activities and travel that evening and found Harrington's answers suspicious. A second officer arrived at the scene and stood nearby. Reiber asked Harrington to remove his hands from his pockets to control Harrington's actions. Then Reiber asked to frisk, without any "specific and articulable facts" that would create an objectively reasonable belief that Harrington was "armed and presently dangerous." The facts in both *Soto-Garcia* and this case create an atmosphere of police intrusion, culminating in a request to frisk.

Harrington, No. 81719-7, 2009 WL 4681239, at *6 (quoting *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993)).

The circumstances supporting a seizure in *Soto-Garcia* and *Harrington* are not present here. In *Soto-Garcia*, we emphasized that the officer asked a direct question about drug possession. *Soto-Garcia*, 68 Wn. App. at 25. The *Harrington* court reasoned that the officer asked Harrington to remove his hands from his pockets "to control Harrington's actions." *Harrington*, No. 81719-7, 2009 WL 4681239, at *6. In both cases, the progressive intrusion into the defendants' privacy culminated in a request to frisk. The *Harrington* court emphasized that "[r]equesting to frisk is inconsistent with a mere social contact" and held that "[w]hen Reiber requested a frisk, the officers' series of actions matured into a progressive intrusion substantial enough to seize Harrington." *Harrington*, No. 81719-7, 2009 WL 4681239, at *6. In contrast, Detective May did not question Smith about illegal activity, attempt to control his actions, or request to frisk him. The detective simply asked for identification, and then asked to look through Smith's wallet, which Smith was holding open at the time.

For these reasons, Smith was not seized before consenting to a search of his wallet. The trial court correctly concluded that Detective May did not improperly contact Smith and that Smith validly consented to the search.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

FACTS

Smith's remaining arguments relate to his bail jumping conviction. Smith failed to appear for his November 2007 unlawful possession trial. On January 28, 2008, the State amended the information to include one count of bail jumping. The trial court read the charges to Smith and set a trial date, but it did not ask Smith to enter a plea to the bail jumping charge.

In March 2008, the trial court found that Smith was never properly arraigned for the bail jumping charge. Before the court could arraign Smith, the State objected to Smith proceeding pro se on the unlawful possession charge and proceeding with appointed counsel on the bail jumping charge. The State proposed separating the two counts by dismissing the bail jumping charge and refiling it as a separate case. The court and Smith's counsel agreed.

The trial court finally arraigned Smith for bail jumping, and defense counsel asked the court to "set a constructive arraignment date of January 28." Report of Proceedings (RP) (Mar. 10, 2008; Roof, J.) at 5-6, 8. The court set a trial date for March 24, 2008, noting this date was "within the 60 days of what is best case scenario for the defense, constructive arraignment on [January 28, 2008]." RP (Mar. 10, 2008; Roof, J.) at 7. Trial commenced on March 25, 2008.

The court declared a mistrial on April 8, 2008. A new trial commenced on July 21, 2008. Smith moved to dismiss with prejudice, arguing his right to speedy trial under CrR 3.3 had been violated. The trial court denied the motion, finding Smith's trial commenced within the time that the court rules mandate. A jury convicted Smith of bail jumping.

ANALYSIS

I. Dismissal of the Bail Jumping Charge

Smith argues that the trial court violated CrR 8.3 by dismissing the bail jumping charge and allowing the State to refile without a written motion.[2] Smith did not object to dismissal of the bail jumping charge at trial.[3] We do not consider an issue for the first time on appeal unless the defendant can point to a manifest error affecting a constitutional right. RAP 2.5(a). Smith provides no legal theory that would support a manifest constitutional error for his argument based on the State's failure to file a written motion.

Smith also argues that dismissing the bail jumping charge violated his right to speedy trial under CrR 3.3 because the "true benefit sought by the State in the dismissal and refilling [sic] of the bail jump charge was the resetting of the time for arraignment." Br. of Appellant at 13, 17-19. The State expressly proposed refiling the charge to avoid a "hybrid" trial

[2] CrR 8.3(a) provides: "The court may, in its discretion, *upon written motion of the prosecuting attorney setting forth the reasons therefor*, dismiss an indictment, information or complaint." (Emphasis added.) Although the prosecutor did not file a written motion in this case, she explained her reasons for requesting dismissal at length on the record.

[3] Smith attempted to object to the dismissal, but Smith was represented by counsel at that time and his defense counsel did not object. A defendant who chooses to be represented by counsel does not have the right to personally conduct his defense. *See State v. Blanchey*, 75 Wn.2d 926, 938, 454 P.2d 841 (1969).

where Smith represented himself for one charge and was represented by counsel for the other charge. *See* RP (Mar. 10, 2008; Hartman, J.) at 2-5. Even if the State's true motive was to avoid the consequences of untimely arraignment, refiling the charge did not reset Smith's arraignment date for speedy trial purposes. As we discuss below, the trial court calculated Smith's speedy trial date based on the date the amended information was first filed, not the date the State refiled the charge.

II. Right to Speedy Trial

Smith argues his untimely arraignment under CrR 4.1 violated his right to speedy trial under CrR 3.3, and the proper remedy is dismissal with prejudice.[4] We review the application of court rules de novo. *State v. Carlyle*, 84 Wn. App. 33, 35-36, 925 P.2d 635 (1996).

A defendant in custody must be arraigned within 14 days after the information is filed, and trial must commence within 60 days after arraignment. CrR 4.1(a)(1); CrR 3.3(b)(1)(i), (c)(1). The proper remedy for untimely arraignment is not dismissal but, rather, for the court to set a constructive arraignment date that "shall constitute the arraignment date for purposes of [the speedy trial rules]." CrR 4.1(2)(b). The constructive arraignment date then triggers the speedy trial time period, and if the defendant is not timely brought to trial, the court must dismiss with prejudice. *See* CrR 3.3(h).

When Smith moved to dismiss for untimely arraignment, the trial court properly established a constructive arraignment date of February 11, 2008, 14 days after the State filed its amended information on January 28, 2008. The final start date for Smith's trial was therefore

[4] Smith also raises this issue in his statement of additional grounds and his PRP.

April 11, 2008, 60 days after the constructive arraignment date. Smith's trial commenced on March 25, 2008, which the trial court noted was "well within that final start date . . . of April 11, 2008." RP (July 21, 2008) 46. Thus, although Smith's arraignment was untimely, the trial court applied the appropriate remedy and Smith's trial commenced within the time CrR 3.3 mandates.

III. Statement of Additional Grounds (SAG)

Smith raises several additional arguments in a SAG, including violations of CrR 3.3(g), CrR 3.2.1(a), CrR 6.11, CrR 4.7(h), and that counsel ineffectively represented him. These claims involve legal issues that we review de novo. *Carlyle*, 84 Wn. App. at 35-36; *State v. Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005).

A. Waiver of Right to Speedy Trial

Smith argues the trial court violated CrR 3.3(g) when it told him he had to waive his right to speedy trial for a 30-day period if he wanted a continuance for an independent lab test. At trial, Smith moved to dismiss based on this argument. The court correctly denied Smith's motion, explaining that CrR 3.3(g) applies only to cases where a defendant moves for a continuance within five days after the time for trial has expired. Smith's trial commenced within the speedy trial time limits, and the court correctly determined that Smith's request for an independent lab test would extend the speedy trial time period for 30 days under CrR 3.3. *See* CrR 3.3(b)(5), (e)(3), (f)(2).

Smith also argues the trial court violated CrR 3.3 when it continued his trial from September 4, 2007, to September 11, 2007, over his objections. The court rules do not prohibit the trial court from rescheduling as long as trial commences within the speedy trial time limits.

See CrR 3.3. Smith's trial commenced within the speedy trial time limits.

B. Probable Cause Determination

Smith argues the trial court violated CrR 3.2.1(a) when it re-arraigned him after declaring a mistrial without a judicial determination of probable cause. A person who is arrested "shall have a judicial determination of probable cause no later than 48 hours following the person's arrest, unless probable cause has been determined prior to such arrest." CrR 3.2.1(a). The rule does not require the court to again determine probable cause after declaring a mistrial.

C. Objection to Substitute Judge

Smith argues the trial court violated CrR 6.11.[5] The rule provides: "If a judge *before whom trial without jury has commenced* is unable to proceed with the trial, a mistrial shall be granted." CrR 6.11(b) (emphasis added). Smith objected to an arraignment hearing before Judge Roof on January 28, 2008, and a status hearing before Judge Olsen on February 21, 2008, on the grounds that his case had been pre-assigned to Judge Hartman. CrR 6.11 does not apply here because Smith's trial had not yet commenced when he raised these objections.

D. Discovery

Smith argues the State violated CrR 4.7(h), which provides that counsel shall not impede opposing counsel's investigation. Smith contends that the State impeded his investigation by (1) failing to provide him with its drug test results before September 4, 2007, and (2) misleading him by stating that its crime lab performed a gas chromatography/mass spectrometry test.

Nothing in the record suggests that the State intentionally impeded Smith's investigation. The alleged drugs were "in the normal [queue] of drug testing" at the State's crime lab and were

[5] Smith also raises this argument in his PRP.

tested in due course on September 4, 2007. RP (Sept. 11, 2007) at 19. Defense counsel stated that the State's crime lab performs gas chromatography/mass spectrometry, and the State did not confirm or deny this assertion. Even if the State did falsely state that its lab performed that test, Smith was not impeded from testing the alleged drugs at an independent lab. He agreed to have the alleged drugs tested at a lab that performs the microcrystal test, even though he knew the microcrystal test is less sophisticated than the gas chromatography/mass spectrometry test. When Smith learned that the State had also performed a microcrystal test, he asked for a second independent test at a lab that would perform the gas chromatography/mass spectrometry test. The trial court properly denied the motion because nothing in the record showed that a different testing method would produce a result different than the tests already performed.

E. Ineffective Assistance of Counsel

Finally, Smith argues that his counsel ineffectively represented him. Smith must overcome the strong presumption that counsel was effective by showing that counsel's representation was deficient, and the deficient representation prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). Smith claims his defense counsel made derogatory statements about him outside of court. At trial, Smith moved for new counsel based on these alleged statements. The trial court denied Smith's motions, finding: "There is nothing in the file or the legal memorandum that [defense counsel] submitted that indicates to this court that he is in any way ineffective." RP (Apr. 8, 2007) at 8. Even assuming defense counsel actually made the alleged statements, Smith has not demonstrated that counsel's performance was deficient. *See Strickland*,

466 U.S. at 687.

Smith also argues his defense counsel failed to locate and call Teresa Wynn as a witness. Smith refers to an attorney who withdrew on April 8, 2007, and the court subsequently declared a mistrial. Smith's newly appointed counsel located Wynn and was prepared to call her as a witness. Smith's defense was not prejudiced. *See Strickland*, 466 U.S. at 687.

Affirmed.

Armstrong, J.

We concur:

Bridgewater, J.

Penoyar, A.C.J.